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IN THE

# Supreme Court of the United States

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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,
*Petitioners,*

v.

KEN BENNETT, *et al.*,
*Respondents.*

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JOHN MCCOMISH, *et al.*,
*Petitioners,*

v.

KEN BENNETT, *et al.*,
*Respondents.*

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**On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICUS CURIAE* [1]

The Center for Competitive Politics (or CCP) is a non-profit 501(c)(3) organization that seeks to educate the public on the effects of money in politics. It does this through studies, legal briefs, historical and constitutional analysis, and media communications. CCP is interested in these cases because they challenge the selective governmental subsidy of political expression, which is part of a misguided effort to encourage participation in tax-funded political campaigns.

CCP believes government funding of campaigns does not serve the state's legitimate interests. Instead, these programs impede political activity and the flow of political information, and call for the state to intervene as a funder in campaigns.

## SUMMARY OF ARGUMENT

CCP urges this Court to reverse the Ninth Circuit. That court held that the Arizona state subsidy at issue survived intermediate scrutiny. State subsidies, and in particular the state's "rescue funds," infringe on First Amendment rights and violate the long-accepted principle that the state must not interfere in campaigns on behalf of particular candidates. The state should be required to prove that it has a sufficient interest served by such laws.[2]

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

[2] Whether such interest must be "compelling" or something less depends on whether the law is subject to "strict" or "intermediate" scrutiny. We believe that strict scrutiny, requiring a compelling interest, is the correct answer. However, under

This Court should question the assumption that "clean elections" laws serve such an interest. We believe that when the Court considers neutral academic studies of clean elections laws, the lack of evidence that such laws benefit the political system or reduce corruption, and the larger context of state-subsidization of political activity, it will conclude that the State has not met that burden.

In this case, the court below *presumed* the state's interest, rather than requiring the state to show how any proper interest was served by the law. This disposition is remarkable given that Arizona's law assists some (but not all) candidates, by using public revenue to ensure that participating candidates will not be outspent. Arizona claims this is necessary to encourage candidates to participate in the public financing system, which in turn prevents corruption. But, the asserted anti-corruption effect of government financing is unsupported by scholarly reviews of the evidence. Furthermore, government funding means the state itself is funding the process by which nominees and officeholders are selected. Such state-imposed burdens on expression and association cannot pass any level of heightened scrutiny, and abrogate the constitutional separation of the incumbent government from the campaign process.

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either standard, the state cannot demonstrate a proper interest in Arizona's system of government financing. Thus we assume, for purposes of argument, that the Court will apply the lower standard of intermediate scrutiny, as did the Ninth Circuit.

## ARGUMENT

### Introduction

The Arizona Clean Elections Act, Ariz. Rev. Stat. § 16-940 *et seq.* provides government funding for campaigns for many Arizona state elective offices.[3] As an incentive to participate, the Act guarantees "equal" funding when participating candidates face a traditionally funded primary or general election challenger who spends (in the primary) or raises (in the general) an amount over the "initial disbursement" the state gave the subsidized candidate.[4] The Act also adds to the participating candidate's funding when independent groups spend enough to bring the total "in opposition" above the amount of the subsidy.[5] Arizona law thus conflates the spending of the candidate opposing a state-funded candidate with money spent – independently – by non-candidate individuals and groups.

Although the law is titled "Equal Funding for Candidates," it would be wrong to presume that "equal" funding is the result. Under Arizona's law, if only one of four primary or general election candidates enrolls in the program, and any one of the other

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[3] The Act funds races for Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction, Corporation Commissioner, Mine Inspector, State Senator, and State Representative.

[4] Ariz. Rev. Stat. § 16-952(A). The additional amount is determined by the amount spent that exceeds the initial disbursement, less 6%, which is intended to reflect fundraising costs otherwise incurred, and certain adjustments for early fundraising not relevant here. The threshold is triggered by opposition spending in the primary, but by fundraising in the general election.

[5] Ariz. Rev. Stat. § 16-952(C).

three spends over the amount of the public grant, the participating candidate alone can receive additional funding. If an outside interest group makes an independent expenditure on behalf of one of the opponents that brings the spending level over the participant's grant level, then the participating candidate (again, alone) can receive additional funding. Left behind in this bipolar system are the other traditionally funded candidates. The grant is not reduced if a non-participating candidate chooses to raise or spend less than the grant amount. And because traditionally funded candidates must incur the added costs of raising funds, each dollar of matching funds has a higher net value than each dollar of privately raised funds.[6] It is more accurate to say that the law's goal is to ensure equal *or better* funding for state-supported candidates.

Proponents of the Act, as well as the court below, contend that the additional "equal" funding is essential to motivate Arizona candidates to participate in the Clean Elections Act. *McComish v. Bennett*, 604 F.3d 720, 735-37 (9th Cir. 2010). That court assumed that "clean elections" laws that provide government funding to campaigns have a salutary effect in the states that adopt them.

We wish first to direct the Court's attention to the absence of any evidence that such benefits do appear in these states. This Court will recognize that *amicus curiae* made a similar argument in support of the petition for a writ of certiorari in this case. We wish to summarize and amplify our previous argument. As we noted before, despite decades of expe-

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[6] *See supra* note 4 (noting statute's assumption that 6% reduction would adequately account for fundraising costs).

rience with various forms of government-funded campaigns, the state cannot demonstrate that government financing of campaigns reduces corruption, or fosters indirect changes (such as increased competitiveness or incumbent turnover) that could be shown to reduce corruption in politics.

We also call the Court's attention to the larger dangers in such programs. These programs violate the important and long accepted principle of separation of campaigns and the state, an interest which is especially acute in the party nomination process. While the state may lawfully ensure a fair process for registering and voting, it does not have authority to intervene in financial support of a particular candidate in the furtherance of "fairness."

## I. CLEAN ELECTIONS LAWS FAIL TO DELIVER PROMISED BENEFITS

### A. Studies from federal and state governments show no real benefits in jurisdictions from "clean elections" laws

Federal and state governments have made only modest attempts to ascertain the benefits that states with tax-funded "clean elections" programs might experience. The *best* that can be said is that some governmental studies have possibly identified some modest correlating benefits, but no causal relationship between those improvements and the laws.

The federal Government Accountability Office ("GAO") has released two studies of "clean elections" laws at the direction of Congress. *See* Pub. L. No. 107-155, 116 Stat. 81 (2002). The GAO reported in 2003, with only two election cycles to examine, that it

was too soon to observe whether the "clean elections" systems furthered the intended goals of increasing competition, voter choice and participation, confidence in government, or reducing campaign spending and interest group influence. *See* GAO, *Campaign Finance Reform: Experiences in Two States That Offer Full Public Funding for Political Candidates* (GAO-10-390) (May 2010) (summarizing 2003 Report, GAO 03-453). In May 2010, GAO reported that it had found statistically significant changes in only one of the five goals of these government funding programs. GAO only observed a decrease in the winner's margin of victory in legislative races in both Maine and Arizona. *Id.* at 35-37. Yet in the end, the GAO could not resolve whether public funding served any of its articulated goals in either Arizona or Maine. *Id.* at 84.

State governments have also attempted to ascertain the effectiveness of "clean elections" laws. The Arizona Clean Elections Commission has never assessed the Arizona Act overall, but has instead commissioned a series of surveys. Maine, by contrast, has reviewed its program. Maine Commission on Governmental Ethics and Election Practices, *2007 Study Report*. The State of Maine observed some positive trends in increasing the number of candidates and reducing private money in politics, but admitted that these trends "might be difficult to attribute" to public financing. *Id.* at 1.[7] In 2008,

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[7] The state identifies a decrease in spending as a "benefit" of such systems. Yet this Court has long recognized that spending supports political speech. *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The presumption of the First Amendment is that speech, especially political speech, is a good thing. While some modest regulation is permitted to combat corruption or its appearance, this Court has never accepted the idea that the

New Jersey assessed its 2007 Clean Elections Pilot Project, which provided public funding in three legislative districts. New Jersey Election Law Enforcement Commission, *2007 Fair and Clean Elections Report* (Mar. 28, 2008), http://www.elec.state.nj.us/clean_elect/downloads/ce_report2007.pdf. The New Jersey Report observed that the Clean Elections Pilot Project did not improve turnout, *id.* at 35; did not reduce spending, *id.* at 41-42; and did not improve the public perception of politics, *id.* App. 1 at 8.

### B. Academic studies have similarly been unable to establish the benefits, if any, of adopting government-funded "clean elections" programs.

In contrast with the scant number of government reports, scholars have released numerous studies of government funding for campaigns. Despite these efforts, scholars can still say little definitively about the effect of such funding on politics and elections. The United States has nearly 40 years of experience with direct government subsidies for candidates, with the first state systems taking effect with the elections of 1974, and the federal presidential system taking effect for the election of 1976.[8] Yet as an expert in this case for the Respondents conceded when assessing the literature on whether public financing in-

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state has an interest, compelling or otherwise, in reducing the amount of political speech. When the state identifies decreased private participation as a *per se* "benefit," it suggests that the state's real goal in adopting government funding is not to address corruption, but simply to reduce the amount of political speech.

[8] *See Buckley*, 424 U.S. at 85 (detailing legislative history of federal provisions).

creased diversity, made elections more competitive, or reduced private influence or costs: "Does public financing achieve any of these goals? The short answer is that nobody knows . . ." Kenneth Mayer, Timothy Werner and Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?*" in Michael P. McDonald and John Samples, eds., THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 246 (2006).

As detailed in our brief at the petition stage, that summarizing statement remains as accurate today as it was in 2006. Brief of *amicus curiae* the Center for Competitive Politics, No. 10-238 & 10-239 (Sept. 16, 2010) at 11-16. We acknowledge that some disagreements about the proper data and techniques will persist in academic circles. *See* Michael G. Miller, *After the GAO Report: What Do We Know About Public Election Financing* (working paper, July 23, 2010), http://sites.google.com/site/millerpolsci/research. However, the dearth of evidence goes beyond a simple dispute over social science techniques.

Many academic studies have evaluated who uses government funding, and whether new or different candidates are able to enter politics because of these programs. It appears that government funding goes to candidates who have already shown political skill in the traditionally funded system. Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POLITICS AND POL'Y QUARTERLY 263 (2008); Raymond J. La Raja, *Does Public Funding of Elections Encourage More Citizens to Run for Office?* (paper presented to the 2009 APSA meeting) http://ssrn.com/abstract=145095. When the focus moves more

directly to consider their effects on corruption, the picture becomes even bleaker for advocates of government campaign financing. *See, e.g.*, Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L. J. 31, 41 (2009); Vincent G. Moscardelli, *Money, Participation and Deliberation in the Connecticut General Assembly*, (paper presented to the 2009 APSA meeting) http://ssrn.com/abstract+1452226.

Even in the most recent scholarship available, no favorable picture emerges about the effects of selective government funding on campaigns and elections. Studies performed using professional econometric analyses draw contradictory conclusions – if they detect any effect at all. *See* Brief of *amicus curiae* the Center for Competitive Politics, *supra*. The Court can surmise that each of these scholars is toiling in good faith, and that the benefits of government financing to a state seeking to reduce corruption have eluded observation thus far.

In short, the Court should not simply presume that the law serves some benefit, as the court below seems to have done. The government has a burden to demonstrate its legitimate interest. If public funding of campaigns serves no state interest, yet burdens protected speech and associational liberties, it follows that a governmental incentive payment – the law at issue here – lacks sufficient justification and is unconstitutional.

## II. TAX FUNDING REGIMES VIOLATE THE IMPORTANT PRINCIPLE OF SEPARATION OF CAMPAIGNS AND STATE

Lost in the debate over government funding of political campaigns is concern for the structural

dangers posed by these systems. In the abstract, the threat could be described as the failure of a constitutionally implied separation of campaigns and the state. As Justice Douglas stated: "Under our Constitution, it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation." *U.S. v. United Auto Workers*, 352 U.S.567, 593 (1957) (Douglas, J., dissenting). The fundamental concept of popular sovereignty counsels against funding of select campaigns by the incumbent government. Candidate subsidies are different, and more dangerous, than the funding of the election machinery, the subsidization of expressive activity generally, or even the subsidy of selective viewpoints, any of which could be justified in the proper contexts. *See, e.g.*, Martin Redish, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 214-15 (2001).

This principle is especially powerful considering the effect of Arizona's matching subsidy in political party primaries. Parties, even in their relatively weaker modern form, provide the essential bridge between incumbent government power and popular accountability. The party nomination process is especially significant to popular sovereignty, and especially vulnerable to state interference.

### A. The government should not selectively fund the process by which officeholders are chosen

Respect for popular sovereignty requires that this Court look closely at laws that allow an incumbent government to fund the process by which its successors in representation are elected. If state power

derives from the consent of the people, and the people retain the ability to alter or abolish that government, it follows that the government has no separate place in that process to influence that choice, unless there is some showing of a need for state action apart from campaigning. As Senator Howard Baker observed during the debate on the Federal Election Campaign Act amendments in 1974, "it is extraordinarily important that the Government not control the machinery by which the public expresses the range of its desires, demands and dissent." 120 Cong. Rec. S8202 (1974), cited in *Buckley* 424 U.S. at 248 (Burger, C.J., dissenting).

The Constitution refers to the power of the "People," that is, popular sovereignty, in the Preamble, and the Ninth and Tenth Amendments.[9] This is not to say that the government has no legitimate role in the political process. States are explicitly authorized to prescribe the time, place and manner of holding elections (including those for federal office) subject to preemption in the case of federal elections by acts of Congress. U.S. CONST. Art. 1, § 4. The government's contemporary role as election administrator was an appropriate remedy to the legacy of corruption in vote buying, fraud, and intimidation

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[9] Moreover, unless one insists on reading it entirely out of the text, the Guarantee Clause protects popular sovereignty. "[T]he subtle invocation of the people in the republican Government Clause of Article IV reaffirms basic principles of popular sovereignty – of the right of the people to ordain and establish government, of their right to alter or abolish it, and of the centrality of popular majority rule in these exercises of ultimate popular sovereignty." Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 UNIV. COLO. L. REV. 749, 762 (1994).

arising in many places from the private administration of elections. *See generally* Richard Franklin Bensel, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY (2004).[10]

This historic role of election administrator is very different from the role Arizona plays. As Chief Justice Burger noted in dissent in *Buckley v. Valeo*, government financing of campaigns is not "simply to police the integrity of the electoral process" but is "the Government's actual financing, out of general revenues, a segment of the political debate itself." 424 U.S. at 248. Burger continued:

> [T]he inappropriateness of subsidizing, from general revenues, the actual political dialogue of the people – the process which begets the Government itself – is as basic to our national tradition as the separation of church and state . . . or the separation of civilian and military authority, neither of which is explicit in our Constitution but both of which have developed through case by case adjudication of express provisions . . .

*Id.* at 248-49 (citations omitted). Admittedly, Chief Justice Burger's argument did not carry the day, but he was addressing the constitutionality of a far more modest public financing regime than the one before this Court. The Court should weigh his points in light of the more intrusive and unbalanced program presented in this case. The Arizona matching subsidy,

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[10] There has been great debate, and a few wars fought, over which individuals get to exercise the power of popular sovereignty. *See generally*, Amar, *supra* note 8. Even in these most trying of circumstances, however, the power itself was not questioned, and all agreed that "government" was necessarily subordinate to, and created by, the people.

unlike the presidential system upheld in *Buckley v. Valeo*, has created a governmental role in campaign financing for the benefit of state-favored types of candidates.

The problems with using government resources to campaign do not arise because, as some have suggested, only "voters" or "people" should be able to participate in politics through the raising and spending of money. *See, e.g.*, Jamie Raskin, *Corporations Aren't People*, NPR (Sept. 10, 2009). The incumbent government as such has no place in subsidizing the debate about its own future suitability. The people, and their organizations, whom all live under the laws and police power of the incumbent government, do – whether or not they can cast a ballot.[11] When the government moves from ensuring an open, fair, organized method of voting and counting ballots, to using its vast resources to intervene in the debate itself, it fundamentally alters the relationship between the governed and the government.

Legal restrictions on the political use of government funds reflect the intuitive merit of this distinction. Federal incumbent officeholders who are candidates for office may not use official resources for campaign purposes. *See, e.g.*, 39 U.S.C. § 3210(a)(4) (prohibiting use of franked mail for political purposes); 18 U.S.C. § 607 (prohibiting political fundraising in federal offices). State laws similarly prohibit such use. *See* Rev. Code Wash. § 42.52.180; Neb. Rev. Stat. § 49-14,101.02; Iowa Code § 68A.505. Government contractors are similarly limited in how

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[11] Thus, minors and resident aliens may campaign and make contributions and expenditures, notwithstanding the fact that they may not vote. *See McConnell v. FEC*, 540 U.S. 93, 231-32 (2003) (minors); 2 U.S.C. § 441e (resident aliens).

public funds may be spent. *See* FAR § *31.205-22*. Congress and state legislatures have further restricted the political activities of public employees, in response to corruption and abuse. *See* 5 U.S.C. §§ 7321 et seq. (codifying the "Hatch Act").

### B. Separation of campaign and state is especially important in party primaries

Although political parties are acknowledged nowhere in the Constitution, and were disfavored by many of its Framers, in modern American politics parties are essential organizations:

> Parties have proven to be reliable mediating institutions that connect citizens to their government. Through their widely understood labels, parties help voters identify and select among candidates and policies. By contesting elections, parties also bring accountability to governing elites . . . [and] parties help to unite various interests through the give-and-take of coalition building.

Raymond J. La Raja, SMALL CHANGE: MONEY POLITICAL PARTIES AND CAMPAIGN FINANCE REFORM 2 (2008).

The extent to which the state can direct political party activity has been a topic of frequent legal dispute. In general, even intra-party reform efforts have often invoked the power of the state, as in the legislative imposition of the direct primary during the Progessive Era. *See* Harold R. Bruce, AMERICAN PARTIES AND POLITICS 296-98 (1927). As state law increasingly set the rules for parties, "[t]hose who controlled the state thus gained the power to structure the system in their own behalf." Tracy

Campbell, DELIVER THE VOTE 97 (2005) (quoting historian Peter Argersinger).

When the government's intervention in party affairs has met with resistance, this Court has been called upon to assess the limits of government control of parties. In *California Democratic Party v. Jones*, this Court took the occasion to review those precedents, and noted "they do not stand for the proposition that party affairs are public affairs . . ." 530 U.S. 567, 573 (2000). The Court observed that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575. Accordingly, this Court has held that the state may not prohibit a state party committee from making pre-primary endorsements, *Eu v. San Francisco County Democratic Cen. Committee*, 489 U.S. 214 (1989); nor may it dictate to a party whether non-party independent voters can participate in party primaries. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The party nomination process is "special," *see* 530 U.S. 575, and should only be subject to state intrusion when a compelling interest (such as stopping invidious burdens on voting rights) is in play. *See, e.g., Terry v. Adams*, 345 U.S. 461 (1953).

The Arizona subsidy program unconstitutionally intrudes into the primary selection process of Arizona's political parties. Any number of candidates may contend for a party's nomination (once they fulfill the state's ballot access requirements, which are not at issue here).[12] *See* Office of the Secretary of

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[12] It is commonplace in Arizona for contested legislative primaries to involve an abundance of candidates seeking their party's nomination. *See, e.g.*, State of Arizona Official Canvass,

State (Arizona), Handbook for Candidates and Political Committees at 15-18, http://www.azsos.gov/election/2010/Info/Candidates_and_Political_Committees/Candidates_and_political_committees.pdf. As observed above, the state program subsidizes only participating candidates, and matches rival candidates' (or groups supporting those candidates) expenditures. It provides nothing for traditionally funded rivals who are also "outspent."

No compelling state interest justifies this imposition. Admittedly, the state may constitutionally direct Arizona's parties to select nominees via a direct primary, *see American Party of Texas v. White*, 415 U.S. 767 (1974), to ensure that party contests are resolved democratically. The state may not reach into the antecedent campaign, and subsidize the candidacies of some potential nominees but not others, unless it can demonstrate a compelling interest. *See Jones*, 530 U.S. at 582. The nomination process has been protected from state incursions in a variety of contexts. *See Jones, supra, Eu, supra, Tashjian, supra, Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). Yet if the Arizona regime is allowed to persist, a party could, after exercising its constitutional right to endorse a candidate for nomination, see its spending on behalf of that candidate matched by the state on behalf of disfavored, unendorsed candidates who decided on their own to participate in the state's funding system.

This interference is beyond any imposed in the other party-regulation disputes brought before this

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2010 Primary Election: August 24, 2010, http://www.azsos.gov/election/2010/Primary/Canvass2010PE.pdf.

Court, and strikes at the heart of party internal speech and associational liberties.[13] As Justice Kennedy stated in another context: "When the State seeks to direct changes in a political party's philosophy by forcing upon it unwanted candidates . . . the State's incursion on the party's associational freedom is subject to careful scrutiny under the First Amendment." *Jones*, 530 U.S. at 587. Once again, the state interest needed to justify Arizona's law is absent.

## CONCLUSION

In the opinion below, the United States Court of Appeals for the Ninth Circuit concluded that Arizona's "clean elections" law, including its "Equal Funding of Candidates" provision, survived intermediate scrutiny because it bore a substantial relation to the State's important interest in reducing *quid pro quo* corruption. 604 F.3d at 732-33. This Court should reverse that ruling, and hold instead that the subsidy is unconstitutional.

At bottom, the advocates of governmental funding can only prevail if they can succeed in making an incoherent argument. They must convince the people (and the courts) that officeholders should not be trusted to raise and spend private campaign funds free of corrupting influences – hence the need for governmental subsidy. Yet, officeholders must necessarily be trustworthy enough to decide how the public fisc is spent in government-funded campaigns in which they are likely to be involved as candidates.

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[13] To the extent campaign finance policy should allow a greater role for parties than at present, these subsidies work against those goals. *See* Peter J. Wallison and Joel M. Gora, BETTER PARTIES, BETTER GOVERNMENT 121-23 (2009).

Arizona's "clean elections" corruption remedy is exactly backwards. The state law attempts to "improve" state governance by bringing campaigns within the funding and control of state officeholders, who will, over time, embrace protectionist policies. It does violence to the implicit constitutional separation of campaigns, during which the people debate the merits of their representatives, and the state, whose interest is limited to carrying out an orderly election. In doing so, Arizona's law confuses the political interest of the incumbent regime with legitimate state interests in orderly elections. It interferes with the important role parties play in the identification and nomination of future representation. Accordingly, this Court should reverse the decision below.

Respectfully submitted,

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